SUPREME COURT, U. S.

FILED

JUL 19 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 393

LEROY GARBER,

Appellant,

—v.—

THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

E. DEXTER GALLOWAY
303 First National Bank Bldg.
Hutchinson, Kansas

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Appellant

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Statute Involved 3

Questions Presented 4

Statement of the Case 5

The Questions Are Substantial 9

Conclusion 20

Appendix

Opinion of the Supreme Court of Kansas 21

Opinion of the District Court of Reno County, Kansas--Filed January 10, 1966 35

Opinion of the District Court of Reno County, Kansas—Filed January 24, 1966 47

Table of Authorities

Cases:

Braunfeld v. Brown, 366 U. S. 599 (1961) 16

Cantwell v. Connecticut, 310 U. S. 296 (1949) 14, 17

Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A. 2d 134 (1951) 15

PAGE

Commonwealth v. Herr, 39 Pa. Super. 454 (1909), aff'd 229 Pa. 312, 78 Atl. 68 (1910) 15
Commonwealth v. Lesher, 17 S & R 155 (1828) 15

Everson v. Board of Education, 330 U. S. 1 (1947) 10, 19

Follett v. McCormick, 321 U. S. 573 (1944) 11
Fowler v. Rhode Island, 345 U. S. 67 (1953) 11, 14, 19

Griswold v. Connecticut, 381 U. S. 479 (1965) 3

Hamilton v. Regents, 293 U. S. 245 (1934) 15
Herndon v. Lowry, 301 U. S. 242 (1937) 17

In re Grady, 61 Cal. 2d 88, 39 Cal. Rep. 912, 394 P. 2d 718 (1964) 14
In re Jenison, 265 Minn. 96, 120 N. W. 2d 515 (1963), vacated and remanded 375 U. S. 14 (1963), reversed 267 Minn. 136, 125 N. W. 2d 588 (1963) 13-14, 15, 17
In re Williams, 269 N. C. 62, 152 S. E. 2d 317 (1967) .. 14

Jacobson v. Massachusetts, 197 U. S. 11 (1905) 15, 16
Jones v. City of Opelika, 316 U. S. 584 (1942) 17
Jones v. City of Opelika, 319 U. S. 103 (1943) 14, 17

Kunz v. New York, 340 U. S. 290 (1951) 14

Marsh v. Alabama, 326 U. S. 501 (1946) 14, 17
Martin v. Struthers, 319 U. S. 141 (1943) 14
Meyer v. Nebraska, 262 U. S. 390 (1923) 19
Murdock v. Pennsylvania, 319 U. S. 105 (1943) 14, 17

PAGE

Niemotko v. Maryland, 340 U. S. 268 (1951) 19

People v. Woody, 61 Cal. 2d 716, 40 Cal. Rep. 69, 394 P. 2d 813 (1964) 14

Pierce v. Society of Sisters, 268 U. S. 510 (1925) 10, 11, 19
Prince v. Massachusetts, 321 U. S. 158 (1944) 15, 16

Reynolds v. U. S., 98 U. S. 145 (1878) 13, 14, 15, 16

Schenck v. U. S., 249 U. S. 47 (1919) 17
Sherbert v. Verner, 374 U. S. 398 (1963) 3, 12, 13, 14, 15, 17
Specht v. Commonwealth, 8 Pa. 312 (1848) 15
Speiser v. Randall, 357 U. S. 513 (1950) 11
Stansbury v. Marks, 2 Dallas 213, 1 L. Ed. 353 (1793) 15
State v. Everly, 150 W. Va. ——, 146 S. E. 2d 705 (1966) 14

Taylor v. Mississippi, 319 U. S. 583 (1943) 17
Thomas v. Collins, 323 U. S. 516 (1945) 17
Torcaso v. Watkins, 367 U. S. 488 (1961) 13, 19
Two Guys from Harrison-Allentown v. McGinley, 366 U. S. 582 (1961) 15

U. S. v. Carolene Products Co., 304 U. S. 144 (1938) ... 17
U. S. v. Hillyard, 52 F. Supp. 612 (E. D. Wash. 1943) 14

West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943) 3, 11, 13
Whitney v. California, 274 U. S. 357 (1927) 17
Wood v. Georgia, 370 U. S. 375 (1962) 17
Wright v. State, 21 Okla. Cr. 430, 209 Pac. 179 (1922) 18

Zellers v. Huff, 55 N. M. 501, 236 P. 2d 949 (1951) 15

PAGE

United States Constitution:

First Amendment ..... *passim*

Fourteenth Amendment 5, 8, 9, 10, 19

Statutes:

28 U. S. C. §1257(2) 3

Chapter 409 of the 1965 Session Laws of the State of Kansas, K. S. A. 1965 Supp. 72-4801 ..... *passim*

Article II, Chapter 72, of the Statutes of Kansas 8

Miscellaneous:

Karpatkin, Public Assistance to Parochial Schools, *America*, April 7, 1966 15

Emerson, Toward a General Theory of the First Amendment, 51-53 (Vintage Edition 1967) 17

Frantz, The First Amendment in the Balance, 71 Yale L. J. 1424 (1962) 17

Bird, The Unyielding Amish, Saturday Evening Post, June 17, 1967, p. 28 18

Garino, Iowa Amish and Nonconformity in 3 Rs, The Wall Street Journal, June 14, 1967, p. 16 18

IN THE

Supreme Court of the United States

October Term, 1967

No. _____

LEROY GARBER,

Appellant,

—v.—

THE STATE OF KANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Kansas, entered on November 5, 1966, which affirmed his conviction of violating the Kansas Compulsory School Attendance Law, by failing to require his minor daughter to attend school as specified in the statute. Appellant submits this statement to show that the Supreme Court has jurisdiction and that substantial questions are presented.

Opinion Below

The decision and opinion of the Supreme Court of the State of Kansas is reported at 197 Kan. 567, 419 P. 2d 896. The opinions of the District Court of Reno County, Kansas,

have not been reported. Copies of these opinions are set forth in the Appendix, *infra*, pp. 21, 35 & 47.

Jurisdiction

The State of Kansas commenced this action in the District Court of Reno County, Kansas, by filing a criminal information charging appellant, LeRoy Garber, with violating Chapter 409 of the 1965 Session Laws of the State of Kansas, K. S. A. 1965 Supp. 72-4801. The charge was that he did unlawfully and willfully fail to require his daughter, Sharon Garber, a minor under the age of 16 years, "to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor".

A jury was waived, and the case was tried to the court on a stipulated set of facts. Appellant defended on the grounds that he was not guilty of any offense and that the statute and its application were unconstitutional infringements of religious liberty. The District Court held the statute constitutional, found appellant guilty as charged, and imposed as its sentence a fine in the amount of $5.00. On November 5, 1966, the Supreme Court of the State of Kansas filed its opinion and decision which affirmed the conviction of Appellant and held the statute constitutional.

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Kansas on January 25, 1967. On March 27, 1967, Appellant's time to file this Jurisdictional Statement was extended for a period of 45 days, by order of the Supreme Court of the State of Kansas; on May 8, 1967, appellant was granted an

additional 60 days in which to file this Jurisdictional Statement; and on July 7, 1967, appellant's time to file this Jurisdictional Statement was further extended for a period of ten days.

Jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C. §1257(2). The following decisions are believed to sustain jurisdiction: *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Statute Involved

Chapter 409 of the 1965 Session Laws of the State of Kansas, K. S. A. 1965 Supp. 72-4801:

> "That every parent, guardian or other person in the state of Kansas, having control over or charge of any child who has reached the age of seven years and is under the age of sixteen years, shall require such child to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in which all instruction shall be given in the English language only, each school year, for such period as the public school of the district in which the child resides is in session.
>
> "Any child who is physically or mentally incapacitated for the work of the common schools is exempt from the provisions of this act. . . . If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of this act, except as specifically provided herein. A child attending sec-

ondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents or the guardian of such child is filed with the proper authorities of the school attended, requesting that the child not be required to participate in such activity and stating the reason for such request."

Questions Presented

1. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Free Exercise of Religion Clause of the First Amendment to the Constitution of the United States.

2. Whether the decision of the Supreme Court of Kansas, in affirming the constitutionality of such statute on the grounds that the First Amendment protects only religious beliefs but not religious practices, is an erroneous interpretation of the First Amendment to the Constitution of the United States.

3. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Establishment of Religion Clause of the First Amendment to the Constitution of the United States.

4. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Establishment of Religion Clause of the First Amendment in that it permits certain types of religious denominational or parochial schools, but forbids the type of religious school selected by the appellant for attendance by his daughter.

5. Whether the foregoing statute, on its face and as interpreted and applied in this case, violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

Prior to July 1, 1965, the Kansas Compulsory School Attendance Law covered children between the ages of seven and sixteen years:

> "Provided, That this act shall not apply to any child who has completed the eighth grade" (G. S. 1949 72-4801).

Sharon Garber, appellant's daughter, completed the eighth grade at Elreka Public School in Reno County, Kansas, in May, 1964 (R. 19). She was then 14 years of age. In September, 1964, Sharon enrolled as a high school student under the Vocational Cultural Plan of a correspondence school, the American School, in Chicago, Illinois (R. 21).

When the Compulsory School Attendance Law was amended, effective July 1, 1965, deleting the eighth grade exemption, the Amish community in Yoder, Kansas, created the Amish Parochial School Vocational Educational Plan, in an attempt to comply with the law. Under this Plan instruction was divided between formal classroom work at the Harmony School in Yoder, and home study and vocational training closely supervised by written reports (R. 20). Sharon Garber was enrolled in both schools at the time the criminal complaint against her father was filed (R. 20, 21). He was accused of failing to comply with the Compulsory School Attendance Law of the State of Kansas (R. 4).

Appellant's refusal to require his daughter to attend a public high school was based on his belief that yielding to such requirement would violate his religion. He concedes the right of the state to insure that his daughter receives certain minimum education, namely, that she learn to read, write, and figure, and that she acquire a basic knowledge of our form of government, so that she be raised as a good citizen and be able to care for herself. Appellant, however, contends that he was providing her with such an education, and that to expose her to the worldly secularization and disturbing influences of the public high school would be directly contrary to his religious beliefs (R. 16, 18, 19).

The following salient facts appear variously in the agreed statement of facts upon which the case was tried, and in the various opinions of the court below:

(1) The District Court found:

> "... that the Amish in Kansas are a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial ...." App., *infra*, p. 45.

(2) Appellant's religious resistance to formal worldly education is based upon his literal reading and acceptance of the Bible as guidance, as prescribed by the Amish religion (R. 16).

(3) Appellant's religious beliefs include properly training and educating his daughter for womanhood. In accordance with the way of life and religious belief of the Amish, he was safeguarding her religious beliefs and faith by keeping her at home, under the influence of her parents, other Amish, and an Amish teacher. At the same time he

insulated her from the worldly distractions and influences which she would receive in public school at this most impressionable age. Excessive contact with modern education would in his view and the view of his church divert her from Amish religious and farm life (R. 12).

(4) Appellant is attempting to maintain his religious way of life through his children. If Sharon were to be sent to a large consolidated public school, she would be part of a minority, wearing peculiar dress, and with habits and customs which would make her subject to ridicule. She would be exposed daily to worldly ways, with their emphasis on entertainments, dances, bands, orchestras and sports, which are contrary to the Amish religious beliefs (R. 18, 19).

(5) Appellant was likewise attempting to comply with the intent and spirit of the law, by providing an education where his daughter was learning to read, to write and to figure. She was taking courses in civil government and United States History, in addition to her vocational training in homemaking, secretarial sciences, general agriculture, English and German (R. 21).

(6) The State maintained, that in order to comply with the law, education had to be received within "four walls," five days a week, six hours a day for 180 days; and that equivalent education, no matter where else it might be procured, was not acceptable.

Appellant contended before the District Court that if his daughter's schooling did not comply with the law, then the law, as applied to him, was invalid and unconstitutional, since the facts showed that his daughter was receiving more than the minimum education required by law (R. 62, 68, 69).

To force him to place her in another school (and a public school is all that would be available) violated his freedom of religion and his natural rights as a parent, without a showing of any danger to either his daughter or to society. Such a requirement would deprive him of the equal protection of the laws, since certain types of private, denominational or parochial schools are allowed, but the parochial schooling chosen by appellant for his daughter is disallowed.

The case was tried to the court without a jury on a stipulated set of facts. The District Court resorted to Article II, Chapter 72, of the Statutes of Kansas, captioned "Common School Courses and Related Provisions" (which, by its very caption, does not relate to parochial or private schools) to find that the Harmony School does not qualify, since it does not meet within four walls for six hours a day, five days a week.

The District Court, in its Memorandum Opinion dated January 10, 1966, found against appellant and imposed its judgment and sentence as indicated (App., *infra*, pp. 35-46).

A motion to amend the Findings, make Additional Findings, amend the Judgment accordingly, and for a new trial, on the ground that Chapter 409 of the 1965 Session Laws violated the Constitutions of the State of Kansas and of the United States (R. 3, 67), was duly filed, and decided by the District Court against the appellant, by Memorandum Opinion dated January 24, 1966 (App., *infra*, pp. 47-54).

The Notice of Appeal to the Supreme Court of Kansas stated, among other grounds, that Chapter 409 of the 1965 Session Laws of Kansas violated the appellant's rights under the First and Fourteenth Amendments to the

Constitution of the United States, specifically, that the Compulsory School Attendance Law, as applied to appellant, violated his constitutionally guaranteed religious freedoms.

The Supreme Court of the State of Kansas affirmed the decision of the District Court, holding that the statute did not violate the freedom of religion clauses of the First Amendment to the United States Constitution (App., *infra*, pp. 30-34). The Court failed to consider whether the statute violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, although these questions were specifically raised.

The Questions Are Substantial

The 1965 statute, and the ruling of the Supreme Court of Kansas upholding its constitutionality, can effectively destroy the entire system of Amish parochial school education in the State of Kansas. For appellant and his fellow-Amish, the education of their children in accordance with Amish religious principles is not just a matter of choice, or preference. It is an essential postulate of their religious faith. Consequently, the Kansas statute, which outlaws Amish parochial schools, is not only a violation of appellant's religious liberty, but it threatens the continued existence of a minority religious group.

This infringement of religious liberty is sought to be justified by the Supreme Court of Kansas on the ground that the First Amendment protects only "religious beliefs," not "religious practices." But neither the cases cited nor the reasoning of the court below support that proposi-

tion, neither generally nor especially as applied to the facts of this case. Indeed there are an increasing number of religious "practices" which this Court and other courts have held to be protected by the First Amendment. Appellant urges that the acts (or omissions) for which he stands criminally convicted are and should be well within the perimeter of constitutionally protected religious liberty.

Moreover, the statute as applied disallows the Amish type parochial school, although the very words of the statute do not make any distinction between public schools and "denominational or parochial" schools. Since one type of religious school is disfavored, the others are preferred. This raises questions of establishment of religion under the First Amendment and corresponding violations of due process of law and equal protection of the laws under the Fourteenth Amendment.

I

Mr. Justice Jackson has aptly described the role of the parochial school: "It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task." *Everson* v. *Board of Education*, 330 U. S. 1, 18, 23 (1947) (dissenting opinion). Since *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), it has been clear that a state may not prohibit parochial school education via a compulsory public school attendance statute. "The child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty,

to recognize and prepare him for additional obligations." 268 U. S. at 535.

Appellant's choice of a religious school for his child may not be restricted because the school operated by his religious group differs from the popular conception of a parochial or denominational school. "The protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views," *Follett* v. *McCormick,* 321 U. S. 573, 577 (1944); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953).

To tell appellant and his fellow-Amish that their religious school can qualify under the Kansas statute, on condition that they arrange for required classroom instruction for a specified number of hours, in no way answers the constitutional claim. Their religious belief *compels* a specific type of religious school, and *forbids* others. Moreover, appellant and his fellow-Amish have a reasonable fear that if they conduct a school which resembles other schools, the children may drift away from their parent's religion. Thus the acceptance of such a condition would require a compromise of religious belief. To compel its acceptance under threat of criminal sanction, is a violation of religious liberty. See *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). It is no less a violation of religious liberty to impose an unconstitutional condition, see *Speiser* v. *Randall,* 357 U. S. 513 (1950), on the operation of a religious school, than it is to ban it altogether, *Pierce* v. *Society of Sisters, supra.*

Consequently, it can hardly be doubted that the Kansas statute, on its face and as applied, threatens the religious liberty of appellant and many others similarly situated.

It imposes a criminal penalty on the observance of religious precepts, and places pressures on appellant to forego them. *Sherbert* v. *Verner, supra.* This Court should note jurisdiction to redress a direct assault on religious liberty in violation of the First Amendment.

II

The Supreme Court of Kansas has apparently acknowledged that the statute infringes on appellant's sincerely held religious beliefs, but it justified the infringement by attempting to draw a distinction "between religious beliefs and religious practices" (App., *infra*, p. 31). The court below seeks to support this distinction by the overbroad assertion that: "Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has *never* been condoned in the name of religious freedom."[1] (*Ibid.*) (Emphasis added.)

With this statement the Supreme Court of Kansas has begged the central questions of the case. Surely there are constitutional limits even to "the exercise of the police power for the general welfare." Whether or not the statute is "reasonable" will certainly depend, at least in part, on whether and, if so, to what extent religious liberty is violated, and on an evaluation of the countervailing interests of the state. There must be some mechanism or test for judging the claim of religious liberty against the

[1] This formulation does not appear to have its origin in any of the cases cited in the opinion below. But see 3 ALR 2d 1401: "It may be stated as a general rule that a failure to comply with reasonable civil requirements beneficial to the health, welfare, or morals of the community will not be condoned in the name of religion."

expressed governmental interest. It is not enough simply to place a badge of "reasonable" on anything which is adopted by majority vote of the legislature.

Nor is the problem met by designing two receptacles, one labelled "beliefs" and the other "practices." Indeed, the court below erred by stating that while beliefs are constitutionally protected, practices have "never been condoned in the name of religious freedom." To the contrary, a wide variety of religious practices[8] have been expressly condoned.[9] These include: refusal of Jehovah's Witnesses to engage in public school flag salute ceremonies, *West Virginia State Board of Education* v. *Barnette, supra*; refusal of a Seventh Day Adventist to be available for Saturday work as a condition for receiving unemployment compensation, *Sherbert* v. *Verner, supra;* an atheist's declining to swear a belief in the existence of God, which was a state constitutional requirement for the holding of public office, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); the refusal, because of religious scruples, to serve on a jury, *In re Jenison*, 265 Minn. 96, 120 N. W. 2d 515 (1963), vacated and remanded 375 U. S. 14 (1963), reversed 267 Minn. 136, 125 N. W. 2d 588

---

[8] To be precise, appellant's criminal conduct was not a religious practice as much as it was a refusal on grounds of religious belief to perform a legally required act. Whether or not there is a constitutional difference between a religiously compelled act, cf. *Reynolds* v. *United States*, 98 U. S. 145 (1878), and a religiously compelled omission, cf. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), it is plain enough from the cases cited in the text that both categories have been condoned.

[9] Curiously, the opinion of the Supreme Court of Kansas neither cites nor attempts to distinguish any of the cases in the text which follows.

(1963);[4] the use, for religious worship purposes, of a hallucinogenic drug, *People* v. *Woody*, 61 Cal. 2d 716, 40 Cal. Rep. 69, 394 P. 2d 813 (1964), see *In re Grady*, 61 Cal. 2d 88, 39 Cal. Rep. 912, 394 P. 2d 728 (1964); and a wide assortment of religious preaching and proselytizing acts and practices, see *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *City of Opelika*, 319 U. S. 103 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).

On the other hand, certain practices, notwithstanding their practitioners' religious bona fides, have been found to be subject to regulation or prohibition notwithstanding the guarantee of religious liberty. These include polygamy, as a practice deeply abhorred by society, *Reynolds* v. *United States*, 98 U. S. 145 (1875); the refusal of compulsory vaccination in the presence of a threatened

---

[4] The *Jenison* litigation illustrates the role of this Court in the definition and expansion of religious liberty under the First Amendment. The Minnesota Supreme Court first ruled that the claim of religious liberty must be subordinated to the obligation to perform jury service. 265 Minn. 96, 120 N. W. 2d 515. In its brief remand order, this Court directed that the question be reconsidered in the light of *Sherbert* v. *Verner*, *supra*. 375 U. S. 14. On remand, the Supreme Court of Minnesota, instead of automatically ruling that the state interest must prevail, applied the balancing test and concluded that ". . . until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall henceforth be exempt." 125 N. W. 2d at 589. This rule has been followed in other states. *State* v. *Everly*, 150 W. Va. ——, 146 S. E. 2d 705 (1966), see *In re Williams*, 269 N. C. 62, 152 S. E. 2d 317 (1967), and was foreshadowed by Judge Schwellenbach in *United States* v. *Hillyard*, 52 F. Supp. 612 (E. D. Wash. 1943).

epidemic, *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); and the vending of religious literature by a nine year old as a violation of a state child labor law, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).*

Thus the most that can be said is that some religious practices are not protected by the First Amendment. The

---

*The Supreme Court of Kansas cited as its principal authority, the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Beiler*, 168 Pa. Super. 462, 79 A. 2d 134 (1951), which in turn cites *Reynolds* v. *United States*, *supra*, *Prince* v. *Massachusetts*, *supra*, and other cases. It is submitted, with respect, that both state Supreme Courts erred in a number of the citations: (1) *Stansbury* v. *Marks*, 2 Dallas 213, 1 L. Ed. 353 (1793) is a one paragraph report of a decision of a Pennsylvania court [not the Supreme Court of the United States] which imposed a fine of 10 pounds on a Jew who refused to be sworn as a witness on the Sabbath. It is completely discredited by *Sherbert* v. *Verner*, *supra*, and *In re Jenison*, *supra*. (2) *Specht* v. *Commonwealth*, 8 Pa. 312 (1848) is an old Pennsylvania Sunday law case punishing a Seventh Day Baptist which is obviously out of phase with *Sherbert* v. *Verner*, *supra*, and not legitimatized by the Twentieth Century economic and sociological changes in the nature of Sunday law observance reflected in *Two Guys from Harrison-Allentown* v. *McGinley*, 366 U. S. 582 (1961). (3) *Commonwealth* v. *Herr*, 39 Pa. Super. 454 (1909), aff'd 229 Pa. 132, 78 Atl. 68 (1910), which forbade the wearing of Mennonite religious garb by a public school teacher is essentially a problem under the establishment of religion clause of the First Amendment, not the religious liberty clause. See *Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949 (1951); see also Karpatkin, Public Assistance to Parochial Schools, *America*, April 7, 1966. (4) *Hamilton* v. *Regents*, 293 U. S. 245 (1934), which approved compulsory ROTC at a state university over a claim of conscientious objection to military training is distinguishable on two grounds: (i) appellant's daughter is subject to a compulsory school attendance law, while university attendance is volitional, and (ii) plaintiffs in the *Hamilton* case were free to seek college education at some institution whose curriculum requirements were compatible with their religious beliefs, but for appellant attendance at any school other than an Amish school would constitute an infringement of religious liberty. (5) *Commonwealth* v. *Lesher*, 17 S & R 155 (1828) another old case, is merely a general statement which offers no guidance for this case. (6) *Reynolds* v. *United States*, *supra*, and (7) *Prince* v. *Massachusetts*, *supra*, are discussed in the text.

problem, which was not even considered by the Supreme Court of Kansas, is to determine and apply the proper criteria.

Appellant urges that this case is not controlled by the polygamy cases, nor by the vaccination cases, nor by the child labor case. Attendance at the Amish type parochial school, while disapproved of by a majority of the Kansas legislature is not, like polygamy, an "odious" practice comparable to human sacrifice, *Reynolds* v. *United States, supra,* or "deeply abhorred by society," *Braunfeld* v. *Brown,* 366 U. S. 599, 619 (1961) (dissenting opinion by Mr. Justice Brennan).

Compulsory vaccination, particularly during an actual or threatened epidemic, *Jacobson* v. *Massachusetts, supra,* is a measure necessary for the health (and frequently life) not only of the individual whose vaccination offends religious beliefs, but for others as well. There are no such considerations in this case.

As for *Prince* v. *Massachusetts, supra,* a state may well have a greater interest in keeping a nine year old off the city streets than in keeping a 15 year old from attending a parochial school which has less than the required number of classroom hours. It is one thing not to interfere with a legislative judgment that a child of tender years will be harmed by the vending of newspapers on city streets, including religious papers. It is quite another to sanction a legislative conclusion that the goals sought to be achieved by compulsory education cannot be satisfied in any other manner than that of the Kansas statute.

Appellant urges that the proper test to be applied in this case, where bona fide questions of religious liberty are

raised, as in all cases of First Amendment freedoms, is the clear and present danger test. See *Cantwell* v. *Connecticut*, *supra*.[7] Surely it will not be contended that appellant's refusal to require his daughter to attend an approved school constitutes a clear and present danger to any valid state interest, "or other immediate threat to public safety, peace or order." *Id.* at 308.[8] The Supreme Court of Kansas, in its mechanistic holding that religious liberty must be subordinated, has ignored the decisions of this Court which have reiterated that religious liberty under the First Amendment occupies a preferred constitutional position. *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943), reversing *Jones* v. *Opelika*, 316 U. S. 584 (1942). Cf. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4 (1938).

Appellant has no quarrel with the principle of compulsory education. But where a state's compulsory education law conflicts with appellant's religious beliefs in terms of the number of classroom hours at the parochial school appellant has chosen, appellant submits that religious liberty does not permit the state simply to outlaw appel-

[7] See also *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Whitney* v. *California*, 274 U. S. 357 (1927); *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). See Emerson, *Toward a General Theory of the First Amendment*, 51-53 (Vintage Edition 1967).

[8] Even if the *ad hoc* balancing test were to be used, appellant submits that the interest in religious liberty outweighs any countervailing state interest. See *Sherbert* v. *Verner*, *supra*; *In re Jenison*, *supra*. See also Frantz, "The First Amendment in the Balance," 71 Yale L. J. 1424 (1962). However, the Supreme Court of Kansas used *no* test, and does not appear to have recognized that any test was appropriate.

lant's choice. At the very least the state must have a rational basis to conclude that appellant's daughter has not achieved or would not be likely to achieve the same educational attainments from her parochial schooling as could have been achieved in a public school or an orthodox parochial school. No such showing has been made here.[9]

The State of Kansas has made no attempt to accommodate the public interest in an educated citizenry with the concededly sincere claim of infringement of religious liberty.[10] This Court should note jurisdiction of this appeal not only to reverse the violation of religious liberty which is before it, but also to lay down the proper metes and bounds of a compulsory school attendance law which clashes with religious scruples.

---

[9] There is no indication that Amish children, educated at an Amish parochial school, turn out any less educated or less capable of coping with the problems of adult life which they will face, than children educated in approved schools. See Bird, "The Unyielding Amish," Saturday Evening Post, June 17, 1967, pp. 28 et seq. See also Garino, "Iowa Amish and Nonconformity in 3 Rs," The Wall Street Journal, June 14, 1967, p. 16.

[10] Even a legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U. S. 479, 488. Compare *Wright* v. *State*, 21 Okla. Cr. 430, 209 Pac. 179 (1922), where the Supreme Court of Oklahoma reversed a conviction of a Seventh Day Adventist who claimed that his religious beliefs compelled him to educate his children at home, in violation of the Oklahoma compulsory school attendance law. The Court held: "So long as the child's education was not neglected, we think these parents, under the Constitution and laws of this state, had a right to manage and supervise the education of their child, if done in a fitting and proper manner." 209 Pac. at 180.

III

Any violation of religious liberty in this case is likewise an act which prefers "one religion over another," *Everson* v. *Board of Education*, 330 U. S. 1, 15-16 (1947), since all other parochial and denominational schools are presumably allowed to operate without interference. The granting of any benefit, or the imposition of any burden, flowing from differences in religious beliefs, constitutes an establishment of religion. *Torcaso* v. *Watkins*, 364 U. S. 488 (1961). Such a preference, and corresponding disfavor, is simultaneously a violation of the constitutional limits placed by the Fourteenth Amendment on state action. It is a denial of the equal protection of the laws, see *Fowler* v. *Rhode Island*, 345 U. S. 67, 70 (1953) (concurring opinion by Mr. Justice Frankfurter); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). It is also a deprivation of liberty without due process of law, see *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923).

CONCLUSION

This case presents substantial federal questions of the scope of religious liberty under the First Amendment. Consideration and resolution of these questions merit plenary argument before the court.

Respectfully submitted,

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

E. DEXTER GALLOWAY
303 First National Bank Bldg.
Hutchinson, Kansas

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Appellant

July 1967